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No. A-558

In the

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD PULLUM, APPELLANT

v.

CINCINNATI, INC., ETC., ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

WAYNE HOGAN
804 Blackstone Building
Jacksonville, Florida 32202
904/632-2424
Attorney for Appellant

February 18, 1986

THE QUESTIONS

1. Whether a statute of repose denies Fourteenth Amendment equal protection when it applies only to victims of 8 to 12 year old defective products, when it discriminates randomly among those victims, and when it bears no rational relationship to any legitimate state objective.

2. Whether the Florida Supreme Court has "eliminated the premise of Pullum's equal protection argument" - as claimed in the decision under review, *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 660 (Fla. 1985) (App., *infra*, 1a-6a).

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* The complete list of parties below includes Richard Pullum, Cincinnati, Inc., the Cincinnati Shaper Company, Sti-Gro Corp., f/k/a Harry P. Leu Machinery Corp., dissolved Florida corporation, Robert H. Stine, and Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-6a) appears at 476 So.2d 657. The denial of rehearing is unreported (App., *infra*, 7a). The opinion of the District Court of Appeal, First District of Florida (App., *infra*, 8a-14a) appears at 458 So.2d 1136 and the decision of the Circuit Court of Duval County (App., *infra*, 15a-17a) is unreported.

JURISDICTION

Richard Pullum appeals the August 29, 1985, judgment of the Supreme Court of Florida, rehearing denied on November 4, 1985, which approved "the result only" of the district court of appeal's affirmance of a summary judgment on statute of repose grounds. Pullum filed the notice of appeal with the Florida Supreme Court on January 2, 1986 (App., *infra*, 18a). By order of January 24, 1986, Justice Powell extended the time for docketing this case until February 18, 1986.

This statement is presented to show that the Court has jurisdiction. A Fourteenth Amendment equal protection challenge has been rejected; and the question is substantial since the state supreme court purports to eliminate retroactively what it acknowledges is a valid federal equal protection argument. 28 U.S.C. § 1257(2).

The statute of repose had originally affected all victims of defective products more than 8 years old. However, in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874, (Fla. 1980) (App., *infra*, *32a-35a)*, the state supreme court had applied the rationale of *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979) (App., *infra*, 20a-31a), and expressly held that, as to all victims of defective products more than 12 years old, the statute violated the Florida Constitution's unique restriction guaranteeing access to

courts. There was no showing of the required "overpowering public necessity" to bar such rights of action before they ever existed. After *Battilla* the statute affected only victims of 8 to 12 year old defective products and could not accomplish the legislature's goal of preventing potential liability for defects in older products. Moreover, the statute discriminated irrationally among this small group of victims with some having one day, one week, one month, one year, two years, three years, three years 364 days, or anywhere in between, to file suit depending strictly upon how close the accident was to the twelfth anniversary of the first delivery.

In the decision under review, the supreme court announced it was "receding from *Battilla* and that it had thereby "eliminated the premise of Pullum's equal protection argument."

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, *Constitution of the United States:*

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The access to courts guarantee - Art. I, Sec. 21, *Fla. Const.* (1968):

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The statute of limitations - §95.11(3)(e), *Fla. Stat.* (1975):

> — Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS. —
>
> (e) An action for injury to a person founded on the

design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

The statute of repose - §95.031(2), *Fla. Stat.* (1975) (quoted in its entirety in the decision under review, App., *infra*, 3a):

> Actions for product liability . . . under §95.11(3) must be begun within the period prescribed in this chapter [four years] . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

The statute of repose, as effectively "amended" by *Battilla's* 1980 enforcement of the Florida access to courts guarantee:

> Actions for products liability . . . under §95.11(3) must be begun within the period prescribed in this chapter [four years] . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered, except that anyone injured more than 12 years after the date of delivery of the completed product to its original purchaser shall have four years to bring an action.

("Amendment" indicated by underscoring.)

The statute of repose as effectively "amended" in 1985 by the Florida court's receding from Battilla in the decision under review:

> Actions for products liability . . . under §95.11(3) must be begun within the period prescribed in this chapter [four years] . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

~~except that anyone injured more than 12 years after the date of delivery of the completed product to its original purchaser shall have four years to bring an action.~~

("Amendment" underscored and Deletion indicated by ~~strikeout~~)

STATEMENT OF THE CASE

Activated by an unguarded foot pedal, the ram of an unguarded press brake machine crushed Richard Pullum's hands. Alleging defective design, he filed suit when more than six months remained on the four-year tort statute of limitations. §95.11(3)(e), *Fla. Stat.* Nevertheless, on the day before trial, the court ruled the action barred by a different statute, the statute of repose, §95.031(2), *Fla. Stat.*, and granted summary judgment. Shortly before the scheduled trial, the manufacturer proved the press brake had been delivered 10½ years before the accident and more than 12 years before Pullum filed suit. Based on this revelation, the court barred the action.

In sum, Richard Pullum diligently filed suit less than four years after his injury, but has been denied a hearing on the merits because, unknown to him, the machine was delivered 10½ years before the accident and, unknown to him, the twelfth anniversary of the delivery passed when 2½ years remained on the four-year statute.

If the machine had been delivered 12 years and one day before his injury, Pullum would have had four full years to file suit.

How The Federal Equal Protection Argument Was Raised

Pullum has consistently sought federal equal protection from the effect of the "amended" statute of repose. The trial

court recited the challenge:

> Plaintiff asserts that the statute is unconstitutional because it denied Plaintiff equal protection of the laws under the Constitution of the United States and of the State of Florida.

(App., *infra,* 17a.) But, the court felt required by *Purk v. Federal Press Company,* 387 So.2d 354 (Fla. 1980), to reject the challenge (App., *infra,* 17a). The district court of appeal reiterated the issue:

> Pullum complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit whereas a person injured by the same machine approximately two and one half years later (at least 12 years after delivery) would have, by virtue of the holding in *Overland,* four years within which to file.

Pullum v. Cincinnati, Incorporated, 458 So.2d 1136, 1138 (Fla. 1st DCA 1985) (App., *infra,* 12a). The district court had also noted

> . . . that those persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was 10 years after delivery, suit would have to be brought within two years; etc.)

458 So.2d at 1138 (App., *infra,* 12a).

The district court affirmed; but, on rehearing, it expressed doubt about *Purk's* relevance by certifying the following "question of great public importance":

> Does Section 95.031(2), Florida Statutes, deny equal protection of the laws to person such as appellant who

are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

458 So.2d at 1140 (App., *infra,* 14a).

The district court's doubts about *Purk* were confirmed by the supreme court. (Undersigned counsel had obtained copies of the *Purk* briefs from the state archives and supplied them to the supreme court to show that Purk's unsuccessful equal protection argument had been entirely different from Pullum's challenge.) Thus, the supreme court approved the district court's "result only" (App., *infra,* 2a) and summarized the "amended" statute's denial of equal protection:

> Pullum asks this Court to quash the decision of the First District and to hold that section 95.031(2), as "amended" by this Court's decision in *Battilla v. Allis Chalmers Manufacturing Co.,* 392 So.2d 874 (Fla. 1980), violates his right to equal protection of the laws. In view of this decision, holding that where section 95.031(2) barred a right of action before it ever existed, it was unconstitutional as applied because it denied access to the courts, *Pullum argues that the statute now irrationally applies to a very limited class of persons, i.e., those persons injured during a time period of eight to twelve years after delivery of the completed product to its original purchaser. Those injured after twelve years have a full four years within which to bring their actions.*
>
> As originally enacted, Pullum maintains, this statute did not deny equal protection because the classifications created by the statute bore a rational relationship to a legitimate state objective. Its legislatively intended purpose was to prevent perpetual liability. It affected all victims of defective products delivered more than eight years before injury. He claims that this statute denied equal protection only after this Court's decision in

Battilla which *gave this statute a limited continuing application to only a small arbitrarily or accidentally chosen class of defective product victims and that it now no longer bears rational relationship to a legitimate state objective.*

Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla. 1985) (App., *infra*, 3a-4a)(emphasis supplied) (footnote omitted).

Pullum relied on *Zobel v. Williams*, 457 U.S. 55, 65, 102 S.Ct. 2309, 2315, 72 L.Ed. 672, 681 (1982), which dealt with an analogous situation in which this Court had held unconstitutional an Alaska statute which irrationally discriminated between Alaskans based on whether they became residents before or after statehood.

To Eliminate The Federal Equal Protection Argument The Florida Supreme Court Abandoned An Established Florida Constitutional Principle And Overruled An Express Holding Of Unconstitutionality

The irrationality and purposelessness of discriminating only against victims of 8 to 12 year old defective products was all too apparent. The equal protection guaranteed by the Fourteenth Amendment was within Pullum's reach. But elimination replaced protection with this facile decree:

We have reconsidered our [1980] decision in *Battilla* wherein we expressly held:

> . . . We reverse on the authority of *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution.

392 So.2d at 874. We recede from this decision and hold that section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution.

Pullum, 476 So.2d at 659 (App., *infra* 4a-5a).

The court offered no justification for making this radical change. Indeed, to their credit, counsel for appellees had accepted, as had counsel for Richard Pullum, that *Battilla* was and would remain the law. Neither party suggested that the court overturn this established protector of the access to courts guarantee; nor did the court suggest that the five years of *Battilla's* enforcement of the access to courts guarantee had detrimentally affected product manufacturers, the judicial system, or society in general. Moreover, the court disregarded the fact that the legislature had accepted *Battilla;* it had made no changes in the statute to cure the access to courts violation. And the court knew that the right of access to courts remained at the heart of the Declaration of Rights of the Florida Constitution and knew that to avoid violating the access to courts guarantee, a statute must meet an "overpowering public necessity for the abolishment of such right." *Overland,* 369 So.2d at 575 (App., *infra,* 23a). The court also knew that

> . . . in Florida . . . the unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this "statute of repose" may be valid under state or federal due process or equal protection clauses.

Id. Nevertheless, in its drive to transform the *Battilla* dissent into the new rule, the court discarded this unique restriction by dropping, apparently for this one statute, the overpowering public necessity requirement. Instead, it used only a rational basis test: "[t]he legislature . . . reasonably decided;" "I perceive a rational and legitimate basis . . . ." *Pullum,* 376 So.2d at 660 (App., *infra,* 5a). The court gave no explanation at all for its abandonment of the heightened standard of review.

The Florida Supreme Court's Assertion: "In Receding From Battilla, We Have Eliminated The Premise Of Pullum's Equal Protection Argument."

Having abandoned the long-established constitutional test for violation of the access to courts guarantee, the court then described the supposed impact of its law-changing adoption of the *Battilla* dissent. The Fourteenth Amendment's guarantee of equal protection became no more than an illusion in a game of "now you see it; now you don't" (at least in Florida courts) when the court said:

> The premise of Pullum's argument is that the "amendment" of this statute by *Battilla* has rendered it violative of his right to equal protection of the laws. He concedes that as enacted, this statute was capable of withstanding an equal protection challenge. Since we have receded from *Battilla,* it logically follows that section 95.031(2) does not deny equal protection. This is so because the classification originally established by the statute bears a rational relationship to a proper state objective. *In receding from Battilla, we have eliminated the premise of Pullum's equal protection argument.*

376 So.2d at 660 (App., *infra,* 6a) (emphasis supplied).

The Logical Question: Did The Receding From Battilla Eliminate The Premise Of Pullum's Federal Equal Protection Argument? The Answer: It Did Not.

We come to correct the court's error, not to criticize the court unduly. Indeed, history reflects that the 1985 author of *Pullum,* a 1980 dissenter in *Battilla,* had just announced his resignation. Pressured by his impending departure, the court issued a phenomenal 64 opinions in two days, August 29 and 30, 1985. 10 Florida Law Weekly 422-492, 495-504. This push to clear the cases in which the resigning justice was

participating may explain how the court, speaking through him, mistakenly said it had, after the fact, "eliminated" a federal equal protection challenge.

In 1980 the *Battilla* court declared that insofar as the statute absolutely barred rights of action, it violated the access to courts guarantee. The court thereby invalidated that aspect of the statute from the time of its 1975 effective date (not merely from the time of *Battilla*) and rendered it as inoperative as if it had never been enacted. *Ex parte Messer,* 87 Fla. 92, 99 So. 330 (1924), *State ex rel Nuveen v. Greer,* 88 Fla. 249, 102 So. 739 (1924). *Pullum* resuscitated it in 1985. Richard Pullum was injured in 1977.

The Florida court has, therefore, misapprehended the effect of its "deunconstitutionalization" of the statute's absolute bar. There is no impact on Pullum's federal equal protection challenge. It remains unanswered.

Reason One. Those in the class that benefitted from *Battilla* (all those injured by older defective products during the decade since enactment) have all had "four full years within which to bring their actions," as the *Pullum* opinion acknowledges. 476 So.2d at 659 (App., *infra,* 4a.) The court's "receding from *Battilla*" could have absolutely no effect on those injured between 1975 and 1985 by older defective products whose cases had already been resolved. Those plaintiffs were not affected in any way by the absolute bar of the statute of repose (because during that time it was unconstitutional; it was a nullity). Thus, the fact remains that Pullum, injured in 1977 by a defective product between 8 and 12 years old, has been deprived of equal protection when compared with those victims whose cases have been resolved and who were injured by defective products less than 8 or more than 12 years old during the decade 1975 to 1985. The receding from *Battilla* did not rectify this unconstitutional discrimination.

Reason Two. Unless the "deunconstitutionalization" of

the statute is retroactive, those victims who were hurt by older defective products during the decade of the statute's unconstitutionality whose cases have not been resolved yet (i.e., cases in the pipeline when *Pullum* was decided) are protected from the statute while Richard Pullum is barred by it. Perplexingly, it appears that the supreme court had not even identified this retroactivity question when the *Pullum* opinion was written. However, the district court of appeal, which had earlier certified Pullum's equal protection challenge to the court, soon faced the issue: Does *Pullum* apply retroactively to destroy the vested *Battilla*-born right of action of a person hurt by a defective product delivered more than 12 years before the accident? Since *Pullum* was silent on this point (the supreme court had not explained how its decision purportedly eliminated Pullum's equal protection challenge), the district court, in *Cassidy v. The Firestone Tire and Rubber Company,* Case No. BK-198 (App., *infra,* 36a.), certified

> . . . the following question as one requiring immediate resolution by the Supreme Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state:
>
> Whether The Rule Announced in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) Is Applicable To Cases Filed Prior To Publication Of That Opinion.

The supreme court, now without the resigned author of *Pullum,* declined to answer the question. *Cassidy v. The Firestone Tire and Rubber Company,* Case No. 68,160 (App., *infra,* 37a). It elected to stand mute on whether its "receding from *Battilla*" is intended to be retroactive, or whether it is a prospective overruling of which Richard Pullum is the chance victim. (The uncertainty bred by the district court's unsuccessful attempt to get an answer from the Florida

Supreme Court on the retroactivity question resulted in Pullum's applying for, and receiving from Justice Powell, a short extension of time for the docketing of this appeal.)

Although the Florida Supreme Court has chosen to await the guidance of the lower Florida courts as to whether its own *Pullum* decision will be permitted to apply retroactively to destroy the vested rights of action of victims of older defective products, Richard Pullum has no such luxury because the court purports to have somehow eliminated the premise of his equal protection argument.

There are substantial reasons to expect that the lower Florida courts will hold that the "deunconstitutionalization" of the long unconstitutional statute will not be given retroactive effect. In *Davis v. Artley Const. Co.*, 18 So.2d 255, 259 (Fla. 1944), the Florida Supreme Court decided that to retroactively deprive a litigant of the benefit of a prior decision on which the litigant's rights depend is to unconstitutionally deprive him of his right of access to the courts. Moreover, in addition to protecting litigants from the unforeseeable impact of changed rulings, the Florida court has *previously* explained that "due process considerations . . . prohibit retroactive abolition of vested rights." *Rupp v. Bryant*, 402 So.2d 658, 666 (Fla. 1982).

Federal due process considerations also make it appear the ultimate result will be non-retroactivity. In *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), this Court held that a recent law-changing decision could not be applied retroactively to time-bar an action. The Court noted that it had overturned a long line of Fifth Circuit rulings. And, apropos to the position of those who have received the benefit of *Battilla's* enforcement of the access to courts guarantee and whose cases have not yet been resolved (i.e., those in the pipeline), the Court declared:

> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing

year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was.

92 S.Ct. at 356. Recognizing the practical implications of a retroactive application of its decision, the Court said (with particular relevance to the causes of action which have accrued under *Battilla,* but which would be absolutely barred if *Pullum* is applied retroactively):

> [R]etroactive application of the Louisiana statute of limitations to his case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable.

Id. Given that those *Battilla*-born causes of action would be absolutely barred if the *Pullum* ruling were retroactive, the Florida plaintiffs would be worse off than Huson, as to whom the Court said:

> It would also produce the most "substantial inequitable results" . . . to hold that the respondent "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him. [W]e invoked the doctrine of nonretroactive application to protect property interests of "cities, bondholders, and others connected with municipal utilities;" and . . . we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury — an injury that may significantly undercut his future earning power — is entitled to similar protection

Id. (emphasis supplied). The Court concluded its analysis by

saying, *"[N]onretroactive application here simply preserves his right to a day in court." Id.* (citations and footnote omitted).

The Result: The Federal Equal Protection Challenge Remains - Unresolved.

A decade of rights of action for victims of older defective products have been unaffected by the 12-year bar, i.e., *those* plaintiffs (unlike Richard Pullum and those in *his* circumstances) have had and are entitled to "four full years within which to bring their actions." Therefore, it is a matter of plain fact that the Florida court has not "eliminated the premise of Pullum's equal protection argument" under the United States Constitution, notwithstanding its "receding from *Battilla.*" Merely saying so does not make it so. The Florida court cannot constitutionally retroactively deprive Richard Pullum of his right to present and have decided his claim of denial of equal protection under the Constitution of the United States.

THE QUESTIONS ARE SUBSTANTIAL

This case merits plenary review, if not summary reversal. It is not every day, indeed our research discloses no other day, when a state supreme court, by changing the law after the fact, attempts to eliminate an obviously valid federal equal protection challenge. Although Richard Pullum's case concerns irrational discriminatory application of a statute of repose, the next case may involve racial, religious, sexual, age or handicap discrimination, or it may be a tax law or criminal law case. Will people who have suffered denial of equal protection in those circumstances be deprived of a remedy because a state court changes the rules for the future but ignores the damage done during the period of irrational discrimination? Equal justice under the law is the mandate of the Fourteenth Amendment. It is not to be taken lightly by state courts.

In 1980 the Florida Supreme Court clipped the tail of the statute of repose but did not invalidate it completely. This necessarily created an equal protection problem. The statute immediately became incapable of accomplishing its only purpose, the prevention of potential perpetual products liability. Thus frustrated, the statute had only a limited continuing application - the cutting short of the limitations period for victims of 8 to 12 year-old defective products. Why discriminate against the victims of pre-teen defective products? There was no reason. Pullum's counsel saw this and made the equal protection challenge.

This Court's decision in *Zobel, supra,* is on point. If the Florida court had simply held that the "amended" statute did not deny Pullum equal protection, summary reversal would plainly be in order. However, without questioning its accuracy, the court detailed the analysis by which Pullum proved the irrational inequality of the "amended" statute. And prior precedent gave Pullum every reason to expect the statute to be invalidated entirely. In the same year as *Battilla,* the court had held that, when a statute could not be interpreted to avoid a due process violation without violating the access to courts guarantee, the court had no choice but to void the statute entirely because "we are left, then, with a statute which is intractably, and incurably, defective." *Aldana v. Holub,* 381 So.2d 231, 238 (Fla. 1980).

Nevertheless, the court abandoned this approach. Although *Battilla* had long before declared the constitutional law and had been fully accepted by the Bench and Bar, and although nothing foreshadowed the overruling, the court announced it would recede from *Battilla.* In this law-changing decision the court recited no change in circumstances, no change in the constitution and no change in the statute itself.

We understand what happened below. A new majority had emerged on the Florida court. This majority liked the social policy expressed by the statute of repose, but the make-up of the court was about to change again. And Richard Pullum's

plight presented perhaps the last opportunity for the court to resurrect the statute.

Pullum does not quarrel in this Court with that court's right to reverse itself and change the rule for the future. Pullum's argument is more fundamental.

The pledge of "EQUAL JUSTICE UNDER LAW" which graces the frontispiece of this Court's building is no mere pebble on a state court's path to social engineering. Yet in its march to revive the statute of repose, instead of allowing the legislature to deal with the problem, the Florida court stepped on Richard Pullum's right to equal justice under the law.

Does the court's end justify its means? This is a substantial federal question. Indeed, because this is an appeal, and not a petition for certiorari, a dismissal for lack of a substantial federal question would constitute an affirmance with implications of momentous proportions - it would give state courts the green light to circumvent the Fourteenth Amendment.

Summary reversal may be in order. If not, full briefing and oral argument are needed. In *Huson* this Court rejected "the fiction that the law now announced [in an overruling decision] has always been the law." 92 S.Ct. at 356. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 454, n.8, 74 L. Ed. 1107 (1930), this Court said

> State courts, like this Court, may *ordinarily* overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.

And in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 148, 77 L.Ed 360 (1932), the court observed that state courts "may *often*" overrule retroactively without violating the Fourteenth Amendment.

We respectfully submit that, when a state court purports to eliminate retroactively a valid equal protection challenge by

overruling a prior express holding of unconstitutionality, it has gone beyond the *ordinary*, beyond what state courts may *often* do, and has run afoul of the Fourteenth Amendment.

CONCLUSION

The appeal involves a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Plenary review, or summary reversal, should be granted.

Respectfully submitted,

Wayne Hogan
804 Blackstone Building
Jacksonville, Florida 32202
904/632-2424

February 18, 1986 ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 18th day of February, 1986 to Michael J. Arington, Esquire, 1001 Blackstone Building, Jacksonville, Florida 32202, Attorney for Appellees; and pursuant to Rule 28.4(c), by United States Mail to The Honorable Jim Smith, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32301, inasmuch as 28 U.S.C. §2403(b) may be applicable since there is drawn in question the constitutionality of a state statute, which had long been held unconstitutional by the Florida Supreme Court, but which has been recently been revived by the decision under review.

Attorney

APPENDIX

No. A-558

In the

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OCTOBER TERM, 1985

RICHARD PULLUM, APPELLANT

v.

CINCINNATI, INC., ETC., ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL STATEMENT

Wayne Hogan
233 East Bay Street
804 Blackstone Building
Jacksonville, Florida 32202
904/632-2424
Attorney for Appellant

Richard PULLUM, Petitioner

CINCINNATI, INC. the Cincinnati Shaper Company, Sti-Gro Corp., f/k/a Harry P. Leu Machinery Corp. dissolved Florida corporation, Robert H. Stine, Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp., Respondents.

No. 66198

Supreme Court of Florida

Aug. 29, 1985.

Rehearing Denied Nov. 4, 1985.

The District Court of Appeal, 458 So.2d 1136, certified as being of great public importance, question whether products liability statute of repose denied equal protection to plaintiff who filed suit against manufacturer more than 12 years from date of delivery of product to original purchaser. The Supreme Court, Alderman, J., held that statute, which provides, inter alia, that an action for products liability must be begun within 12 years after date of delivery of completed product to its original purchaser does not deny equal protection under the state Constitution.

Decision approved.

Adkins and Overton, JJ., dissented.

Constitutional Law ⇐ 249(3)
Limitation of Actions ⇐ 4(2)

Statute of repose, West's F.S.A. § 95.-031(2), provising inter alia, that actions for products liability must be begun within 12 years after date of delivery of completed product to its original purchaser does not deny equal protection

guaranteed by West's F.S.A. Const. Art. 1, § 21; receding from *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874.

Wayne Hogan of Brown, Terrell, Hogan & Ellis, Jacksonville, for petitioner.

Michael J. Arington of Ellis E. Neder, Jr., P.A., Jacksonville for respondents.

Cathy Jackson Burris, Ft. Lauderdale for Academy of Florida Trial Lawyers, amicus curiae.

ALDERMAN, Justice.

We review the decision of the District Court of Appeal, First District, in *Pullum v. Cincinnati,* 458 So.2d 1136 (Fla.1984) wherein the district court certified the following question as being of great public importance:

> Does section 95.031(2), Florida Statutes deny equal protection of the laws to persons such as appellant [petitioner] who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

Id. at 1140. The First District, on the authority of several decisions of our Court, answered this question in the negative and affirmed the summary judgment against Pullum. We approve the result only of this decision.

Richard Pullum was injured in April 1977 while operating a Cincinnati press brake machine which had been delivered to the original purchaser in November 1966. He filed suit against the manufacturer in November 1980, more than twelve years from this delivery date but within the applicable four-year statute of limitations. The trial court granted summary judgment against Pullum on the basis that his action was barred by section 95.031(2), Florida Statutes (1979). This statute of repose provides:

(2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

The district court affirmed. Relying on *Purk v. Federal Press Co.*, 387 So.2d 354 (Fla.1980), it held that the reduction by this statute of repose of the time within which he was required to file suit after his accident from four years to one and one-half years did not deny him equal protection of the laws. It explained that the fact that Mrs. Purk's injury occurred prior to the enactment of section 95.031 and was covered by a one-year savings clause, while Pullum's injury occurred after the effective date of the act, did not furnish Pullum with any equal protection argument materially different from that of Mrs. Purk's. Pullum conceded that application of section 95.031(2) did not deny him his right to access to the courts guaranteed by article I, section 21 of the Florida Constitution.

Pullum asks this court to quash the decision of the First District and to hold that section 95.031(2), as "amended" by this Court's decision in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla.1980), violates his right to equal protection of the laws. In view of this decision, holding that where section 95.031(2) barred a right of action before it ever existed, it was unconstitutional as applied because it denied access to the courts, Pullum argues that the statute now irrationally applies to a very limited class of persons, *i.e.*, those persons injured during a time period of

eight to twelve years after delivery of the completed product to its original purchaser. Those injured after twelve years have a full four years within which to bring their actions.

As originally enacted, Pullum maintains, this statute did not deny equal protection because the classifications created by the statute bore a rational relationship to a legitimate state objective. Its legislatively intended purpose was to prevent perpetual liability. It affected all victims of defective products delivered more than eight years before injury. He claims that this statute denied equal protection only after this Court's decision in *Battilla* which gave this statute a limited continuing application to only a small arbitrarily or accidentally chosen class of defective victims and that it now no longer bears rational relationship to a legitimate state objective.*

Pullum further urges that this Court find that this case involves an entirely different equal protection challenge than was made in *Purk*. Mrs. Purk's argument, he states, was strictly directed to the legislature's choice of twelve years as an ultimate cutoff point to prevent perpetual liability.

We have reconsidered our decision in *Battilla* wherein we expressly held:

> The circuit court held that this product liability action was barred by the statute of limitations, section 95.031,

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* Pullum also refers to *Diamond v. E.R. Squibb and Sons, Inc.*, 397 So.2d 671 (Fla.1981), as being in accord with *Battilla*. In *Diamond*, we held that the operation of section 95.031(2) operated to bar a cause of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But *Diamond* presents an entirely different factual context than existed in either *Battilla* or the present case where the product first inflicted injury many years after its sale. In *Diamond* the defective product, a drug known as diethystilbestrol produced by Squibb was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955 - 1956. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiff's claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*. Were it applicable, there certainly would have been a denial of access to the courts.

Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Sirmons,* 369 So.2d 572 (Fla.1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. *See also Purk v. Federal Press Co.,* 387 So.2d (Fla.1980); *Bauld v. J.A. Jones Construction Co.,* 357 So.2d 401 (Fla. 1978).

392 So.2d at 874. We recede from this decision and hold that section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution. The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031(2) in his dissenting opinion in *Battilla,* correctly reasoned as follows:

> Until the decision of *Matthews v. Lawnlite Co.,* 88 So.2d 299 (Fla.1956), Florida recognized the early common law rule which inhibited recovery where there was no privity of contract. Since then the law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.
>
> This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufacturer products.
>
> . . . I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the

relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in *Overland*, and those listed in section 95.031(2).

The premise of Pullum's argument is that the "amendment" of this statute by *Battilla* has rendered it violative of his right to equal protection of the laws. He concedes that as enacted, this statute was capable of withstanding an equal protection challenge. Since we have receded from *Battilla*, it logically follows that section 95.031(2) does not deny equal protection. This is so because the classification originally established by the statute bears a rational relationship to a proper state objective. In receding from *Battilla*, we have eliminated the premise of Pullum's equal protection argument.

Accordingly we hold that the granting of summary judgment by the trial court was proper, and we approve the result of the district court's decision which affirms the summary judgment.

It is so ordered.

Supreme Court of Florida

MONDAY, NOVEMBER 4, 1985

RICHARD PULLUM,

Petitioner,

v.

CINCINNATI, INC., et al.,

Respondents.

CASE NO. 66,198

District Court of Appeal,
1st District - No. AU-62

Upon consideration of the Motion for Rehearing filed by attorney for petitioner and the Motion for Rehearing and Clarification filed by attorneys for Amicus Curiae, Academy of Florida Trial Lawyers, and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied.

BOYD, C.J., McDONALD, EHRLICH and SHAW, JJ., concur

OVERTON, J., I find nothing new in the petition for rehearing; consequently, I am bound to deny rehearing even though I disagree with the majority opinion and would allow a claim to be brought within the four-year statute of limitations period if the cause of action accrued within the twelve-year period of the statute of repose.

ADKINS, J., dissents

Richard PULLUM, Appellant,

v.

CINCINNATI, INCORPORATED, the Cincinnati Shaper Company, Sti-Gro First Corp., formerly known as Harry P. Leu Machinery Corporation, a dissolved Florida corporation, Robert H. Stine, Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp., Appellees.

No. AU-62.

District Court of Appeal of Florida,
First District.

Sept. 26, 1984.

Rehearing Denied Nov. 16, 1984.

Worker injured while operating press brake machine filed suit against manufacturer and others on basis of negligence, implied warranty, and strict liability. The Circuit Court, Duval County, John M. McNatt, J., entered summary judgment against worker on basis that claim was barred by statute of repose, and worker appealed. The District Court of Appeal, Nimmons, J., held that: (1) application of statute of repose to worker reducing time within which he was required to file suit after accident from four years to a little over one and one-half years did not amount to proscribed limitation of access to courts under State Constitution, and (2) fact that operation of statute of repose reduced otherwise available four-year limitation period to period of a little more than one and one-half years in which to file suit, whereas those persons injured by products delivered 12 years or more before injury would continue, by application of holding in

Florida Supreme Court case finding that barring of cause of action under similar statute of repose before cause of action accrued was repugnant to constitutional guarantee of right access to courts, to have four years within which to file suit, was not a denial of equal protection.

Affirmed.

1. Constitutional Law ⇐ 328
Limitation of Actions ⇐ 4(2)

Application of statute of repose to worker who, after being injured while operating press brake machine, filed suit against manufacturer of machine and others on basis of negligance, implied warranty and strict liability within four-year limitations period for such action, but more than 12 years after a delivery of press brake to original purchaser, did not amount to proscribed limitation of access to courts under State Constitution, even though application of statute of repose reduced period within which worker was required to file suit after accident from four years to a little over one and one-half years. West's F.S.A. Const. Art 1, § 21; West's F.S.A. §§ 95.031(2), 95.11(3)(e).

2. Constitutional Law ⇐ 249(3)
Limitation of Actions ⇐ 4(2)

Fact that operation of statute of repose reduced otherwise available four-year limitation period for worker injured by equipment installed within 12 years of injury to period of a little more than one and one-half years in which to file suit against manufacturer, whereas those persons injured by products delivered 12 years or more before injury would continue, by application of holding in Florida Supreme Court case finding that barring of cause of action under statute of repose before cause of action accrued is repugnant to constitutional guarantee of right of access to courts, to have four years within which to file suit, was not a denial of equal

protection. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 21; West's F.S.A. § 95.031(2).

Wayne Hogan of Brown, Terrell & Hogan, Jacksonville, for appellant.

Ellis E. Neder, Jr., Jacksonville, for appellees.

NIMMONS, Judge.

Richard Pullum, plaintiff below, appeals a summary judgment entered against him on the basis that his claim was barred by Section 95.031(2), Florida Statutes,[1] a statute of repose. We affirm.

On April 29, 1977, Pullum, while operating a Cincinnati pressbrake machine, was injured by the machine. On November 26, 1980, Pullum filed suit against the manufacturer and others on the basis of negligence, implied warranty and strict liability. Although the suit was filed within the four-year limitations period provided for in Section 95.11(3)(e), Florida Statutes, it was not filed within twelve years from the November 11, 1966, delivery of the subject pressbrake to the original purchaser as required by the statute of repose. Therefore, the trial court entered summary judgment against Pullum.

[1] Application of the statute of repose to Pullum reduced the time within which he was required to file suit after his accident from four years to a little over one and one-half years. This does not amount to a proscribed limitation of

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[1]Section 95.031(2) provides: (2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period described in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), *but in any event within 12 years after the date of delivery of the completed product to its original purchaser* or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered. (e.s.)

access to courts under Article I, Section 21, of the Florida Constitution. See *Cates v. Graham,* 451 So.2d 475 (Fla.1984); *Purk v. Federal Press Company,* 387 So.2d 354 (Fla.1980); *Bauld v. J.A. Jones Construction Company,* 357 So.2d 401 (Fla.1978). Pullum concedes that point but urges that the application of the subject statute denies equal protection of the law. He points out that if the accident had occurred twelve years or more after delivery of the machine, the statute of repose would not have barred his action, and he would have had, pursuant to Section 95.11(3), four years from the accident date within which to file his suit. This is so because of the Supreme Court's holding in *Overland Construction Company, Inc. v. Sirmons,* 369 So.2d 572 (Fla.1979), in which the court held that the barring of a cause of action under a similar statute of repose[2] before the cause of action accrued is repugnant to the Article I, Section 21, guarantee of the right of access to courts.[3] The results of the interplay among the regular four-year limitations statute, the twelve-year statute of repose and the holding in *Overland* are: (1) that a person who sustains an injury at any time within eight years from the product's initial delivery date will have four years from the date of injury within which to file suit; (2) that a person injured twelve years or more after the delivery date will also have four years from the date of injury to sue because *Overland* would preclude the operation of the twelve-year statute; provided, however, that such person might not have as many as four years to bring the action

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[2] Although the statute of repose involved in *Overland,* Section 95.11(3)(c), deals with liability for improvements to real property, the *Overland* holding applies equally to product liability statutes of repose such as Section 95.031(2). See *Battilla v. Allis Chalmers Manufacturing Company,* 392 So.2d 874 (Fla.1981); *cf. Purk v. Federal Press Company, supra.*

[3] In *Overland, supra,* the Court distinguished *Bauld, supra,* pointing out that, in *Bauld:* (1) the injury occurred prior to the enactment of the applicable statute of repose; (2) two and one-half years of the four year limitations period had elapsed when the statute was enacted: and (3) a savings clause extended the deadline an additional year for filing suit on existing causes of action which otherwise would have been terminated by the new twelve-year limitation.

where his injury occurred prior to January 1, 1975, the effective date of Chapter 74-382, Laws of Florida (the law creating Section 95.031), and where he would be required to file suit by January 1, 1976, by virtue of the one-year savings clause provided for by Chapter 74-382, section 36; and (3) that those persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was 10 years after delivery, suit would have to be brought within two years; etc.). Pullum complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit whereas a person injured by the same machine approximately two and one-half years later (at least 12 years after delivery) would have, by virtue of the holding in *Overland,* four years within which to file.

The Supreme Court of Florida has consistently sustained such statutes of repose against constitutional attack where application of the statute leaves the plaintiff with sufficient time to institute suit after injury or discovery of the cause of action. See *Cates v. Graham, supra; Purk v. Federal Press Co., supra; Bauld v. J. A. Jones Construction Company, supra; Universal Engineering Corp. v. Perez,* 451 So.2d 463 (Fla.1982); *compare Overland Construction Company, Inc. v. Sirmons, supra; Diamond v. Squibb and Sons,* 397 So.2d 671 (Fla.1981); and *Baitilla v. Allis Chalmers Manufacturing Company, supra.* Admittedly, most of these authorities have dealt with attacks under the Article I, Section 21, "access to courts" provision.[4] However, in *Purk,* the plaintiff also

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[4]For example, the Court stated in *Overland, supra:* "[T]he unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this 'statute of repose' may be valid under state or federal due process or equal protection clauses."

contended that the statute denied her equal protection of the laws, which contention was rejected by the Supreme Court. Mrs. Purk was injured on April 24, 1973, by a punch press machine which had originally been delivered on June 2, 1961. The applicable limitation statute would have given her four years from the injury date within which to file suit. However, the statute of repose, enacted effective January 1, 1975, barred actions for injuries occurring twelve years or more after the delivery date. But the statute's savings clause afforded one year to all existing causes of action (i.e., until January 1, 1976) within which to file suit. Mrs. Purk's four-year period for filing suit was therefore reduced to approximately two years and eight months (the period of time between the April 24, 1973, date of accident and the savings clause date, January 1, 1976). In contrast, a person injured by the same machine almost one year and four months earlier than the date of Mrs. Purk's injury would have had four years within which to file suit. Moreover, and perhaps more significantly, the Supreme Court in *Purk* recognized that the statute of repose with which it was dealing was subject to its decision a year earlier in *Overland, supra,* which materially affected the application of the statute by, as we have noted, holding that persons injured after the running of the twelve-year statute of repose would have four full years from the date of injury within which to file suit. The *Purk* court, nevertheless, held that the statute did not deny equal protection of the laws.

[2] The fact that Mrs. Purk's injury occurred prior to the enactment of Section 95.031 and thus was covered by the one-year savings clause of Chapter 74-382, Section 36,[5] whereas Pullum's injury occurred after the effective date of the act, does not furnish Pullum with any equal protection argument materially different from that of Mrs. Purk. The statute of repose operated on both to reduce their otherwise

[5] This savings clause was codified as Section 95.022, Florida Statutes (1975).

available four-year limitation periods to lesser periods whereas those persons injured by products delivered twelve years or more before the injury continue to have four years within which to file suit. The Supreme Court having denied in *Purk* the equal protection attack on the subject statute, we likewise reject such attack in the instant case.

Essentially, persons such as Mr. Pullum who claim to have been caught in the legislatively imposed statute of repose time squeeze are left only with a denial of access to the courts argument where the injury occurs too close in time to the end of the twelve-year period. As previously noted, this argument is unavailing to Pullum inasmuch as one and one-half years still remained after the accident before the twelve-year period expired. In *Cates v. Graham, supra,* which involved application of another statute of repose dealing with medical malpractice,[6] the Supreme Court held that a five-to-six-month time squeeze imposed by the statute upon the plaintiff did not constitute an unconstitutional denial of access to the courts. See also *Cobb v. Maldonaldo,* 451 So.2d 482 (Fla. 4th DCA 1984) (on motion for rehearing).

The summary judgment is Affirmed.

MILLS and SMITH, JJ., concur.

On Motion for Rehearing

PER CURIAM.

Although we deny the appellant's motion for rehearing, we certify the following, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v), as a question of great public importance:

> Does Section 95.031(2), Florida Statutes, deny equal protection of the laws to persons such as appellant who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

MILLS, SMITH and NIMMONS, JJ., concur.

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[6] Section 95.11(4)(b), Florida Statutes.

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 80-14330-CA

DIVISION: O

RICHARD A. PULLUM,

Plaintiff,

vs.

CINCINNATI, INCORPORATED,

et al

Defendants.

SUMMARY FINAL JUDGMENT

This cause came on for further hearing and Defendant moved (ore tenus) for the entry of Summary Judgment on the ground that the action was barred by that Statute of Limitations, Chapter 95.031(2), Florida Statutes.

The Court having ruled that the action is barred by the Statute of Limitations, and Plaintiff having waived the requirements of twenty days notice (Rule 1.510, Rules of Civil Procedure) and there being no genuine issue as to material fact with regard to the Statute of Limitations, it is

ORDERED AND ADJUDGED:

1. The Motion is granted.

2. Plaintiff shall take nothing by this action, and Defendants shall go hence without day and recover from Plaintiff their costs to be taxed on Motion and Notice.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 29th day of June, 1983.

s/John M.McNatt

CIRCUIT JUDGE

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 80-14330-CA

DIVISION: O

RICHARD A. PULLUM,

Plaintiff,

vs.

CINCINNATI, INCORPORATED, et al

Defendants.

ORDER RE: STATUTE OF LIMITATIONS

At their special request the parties have been heard upon the question of whether this action is barred by the statute of limitations, namely Chapter 95.031(2), Florida Statutes.

The parties stipulated before the Court.

(a) The machine, a Press Brake, was delivered to the original purchasers on November 11, 1966.

(b) The Plaintiff was injured while operating the machine on April 29, 1977.

(c) This action was filed November 25, 1980.

The cited statute requires that such an action be filed "within 12 years after the date of delivery," whereas this action was filed fourteen years and fourteen days after the date of delivery; and three years, six months and twelve days after the injury.

The Plaintiff had one year six months and twelve days to file his action before the statute ran, but did not do so.

Plaintiff asserts that the statute is unconstitutional because it denies Plaintiff equal protection of the laws under the Constitution of the United States and of the State of Florida. However, the Supreme Court of Florida has held the statute to be Constitutional. *Purk v. Federal Press Company* (Fla) 387 So(2d) 354.

This action falls squarely within the *Purk* decision, and the Court is compelled to rule that the action is barred by said statute of limitations.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 27th day of June, 1983.

s/John M. McNatt

CIRCUIT JUDGE

IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. 66,198

RICHARD PULLUM, Appellant

vs.

CINCINNATI, INC., THE CINCINNATI SHAPER COMPANY, STI-GRO CORP., f/k/a Harry P. Leu Machinery Corp. dissolved Florida corporation, ROBERT E. STINE, EUGENIE E. STINE and ROBERT E. GROTH, as directors and/or trustees of Sti-Gro First Corp., Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Pullum, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida entered in this action on November 4, 1985, by denial of rehearing. The judgment approved "the result only," but not the rationale, of the district court of appeal's decision affirming the summary judgment entered by the trial court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 30th day of December, 1985 to Ellis E. Neder, Jr., Esquire, 1001 Blackstone Building,

Jacksonville, Florida 32202, Attorney for Appellees, Cathy J. Burris, Esquire, P.O. Box 030067, Ft. Lauderdale, Florida 33303 and W. C. Gentry, Esquire, 101 East Adams Street, Jacksonville, Florida, Attorneys for Amicus Curiae, Academy Florida Trial Lawyers.

BROWN, TERRELL, HOGAN & ELLIS, P.A.

s/Wayne Hogan

WAYNE HOGAN
804 Blackstone Building
Jacksonville, Florida 32202
904/632-2424
Attorneys for Appellant

OVERLAND CONSTRUCTION COMPANY, INC., Petitioner,

v.

Jerry L. SIRMONS, et ux., et al., Respondents (Two cases).

Nos. 52799, 52788.

Supreme Court of Florida.

March 1, 1979.

Action was brought against building owner and building contractor to recover for injuries which plaintiff sustained in the building while in the course of his employment. Contractor moved for summary judgment based on the statutory 12-year ban on lawsuits arising out of improvements to realty. The Circuit Court, Palm Beach County, Vaughn J. Rudnick, J., declared the limitation period unconstitutional. Review was sought by way of certiorari and appeal. The Supreme Court, England, C. J., held that statute providing that an action founded on the design, planning or construction of an improvement to realty must be brought against the professional engineer, registered architect or licensed contractor within 12 years after completion of the improvement violates constitutional right of access to courts insofar as it provides an absolute bar to lawsuits brought more than 12 years after events connected with construction of the improvements.

Affirmed.

Alderman, J., dissented and filed opinion in which Boyd and Overton, JJ., concurred.

Constitutional Law ⇐ 328

Limitation of Actions ⇐ 4(2)

Statute providing that an action founded on the design, planning or construction of an improvement to realty must be brought against the professional engineer, registered architect or licensed contractor within 12 years after construction of the improvement violates constitutional right of access to the courts insofar as it is an absolute bar to lawsuits brought more than 12 years after events connected with construction of the improvement; fact that passage of time aggravates difficulty of producing reliable evidence and that advances in technology tend to push industry standards higher do not justify such limitation. West's F.S.A. § 95.11(3)(c); West's F.S.A.Const. art. 1, § 21.

Justice W. Reid of Magill, Sevier & Reid, Palm Beach, and Edna L. Caruso, West Palm Beach, for petitioner-appellant.

Richard L. Martens of Cone, Owen, Wagner, Nugent, Johnson & McKeown, and Larry Klein, West Palm Beach, for respondents-appellees.

ENGLAND, Chief Justice.

In this proceeding we are called upon to review the constitutionality of section 95.11(3)(c), Florida Statutes (1975), insofar as it absolutely bars the right to bring suit for certain injuries incurred on real property unless the lawsuit is commenced within twelve years after the completion of the improvements which produced the injury. The relevant portion of the statute, which limits actions "founded on the design, planning, or construction of an improvement to real property," states:

> In any event the action must be commenced within 12 years after the date of actual possession by the owner,

> the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professinal engineer, registered architect, or licensed contractor and his employer.

In 1961, Overland and another company completed construction of a building in West Palm Beach. In 1975, more than twelve years after Overland's completion of construction, Jerry Sirmons was injured in the building in the course of his employment. He sued both the owner of the building and its builders. When Overland moved for a summary judgment based on the statutory twelve year ban on lawsuits, the quoted portion of section 95.11(3)(c) was declared unconstitutional by the trial court, thereby allowing Sirmons and the other respondents to proceed with the lawsuit notwithstanding the seeming bar of the statute. Overland has now sought to have the ruling reversed here, pursuant to article V, section 3(b)(3), Florida Construction, and *Burnsed v. Seaboard Coastline Railroad Co.*, 200 So.2d 13 (Fla.1974.

The trial court held the statute unconstitutional as violative of article I, section 21 of the Florida Constitution,[1] which provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This constitutional mandate which has appeared in every revision of the state constitution since 1838,[2] has no counterpart in the federal constitution and derives its scope and meaning solely from Florida case law.[3] The polestar

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[1]The trial court also invalidated the statute on other constitutional grounds, but our disposition of this case makes it unnecessary to address those issues.

[2]*G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 901 (Fla. 3d DCA 1977).

[3]*See*, for example, *Carter v. Sparkman, 335 So.2d 802 (Fla.1976), cert. denied*, 249 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753 (1977); *Sunspan Eng'r & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla.1975); *Scholastic Systems, Inc. v. LeLoup*, 307 So.2d 166 (Fla.1974); *Kluger v. White*, 281 So.2d 1 (Fla.1973); *Flood v. State ex rel. Homeland Co.*, 95 Fla. 1003, 117 So. 385 (1928).

decision for the construction of this provision is *Kluger v. White,* 281 So.2d I, 4 (Fla.1973), in which we held:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Based on *Kluger,* then, we must first decide whether the legislature, without providing any reasonable alternative, has abolished a statutory or common law right of action protected by article I, section 21,[4] and if so, whether that action is grounded both on an overpowering public necessity and an absence of any less onerous alternative means of meeting that need.

It is undisputed that a cause of action of the type asserted by Sirmons in this case — the right of an injured person to bring suit against a building contractor with whom he is not in privity for damages suffered as a result of alleged negligence in construction even after the owner has accepted the completed building — is one for which a right of redress is guaranteed by article I, section 21. This common law right, though not expressly recognized by statute until 1975,[5] was

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[4]§ 2.01, Fla.Stat. (1975), provided that "[t]he common and statute laws of England which are of a general and not a local nature . . . to be of force in this state . . . " The common law principles as adopted by section 2.01, however, have not been confined as of 1776, but have been held to be "designed for application to new conditions and circumstances." *State ex re. Burr v. Jacksonville Terminal Co.,* 90 Fla. 721, 744, 106 So. 576, 584 (1925).

[5]Ch. 74–382, § 7, laws of Fla., codified as § 95.11(3)(c), Fla.Stat. (Supp.1974) (effective January 1, 1975).

acknowledged as extant by this Court in 1959.[6] When the "access to courts" provision of the constitution was re-adopted in 1968, there existed a right of redress against contractors for the type of injury Sirmons suffered, provided, of course, that suit was commenced within four years[7] after the cause of action accrued by the occurrence of the injury.

Section 95.11(3)(c), insofar as is relevant to this proceeding, creates absolute immunity from suit for certain professionals and contractors connected with the construction of improvements to real property after the expiration of twelve years from the completion of the building. It unquestionably abolished Jerry Sirmons' right to sue Overland for his injuries and provided no alternative form of redress. The only remaining issue under *Kluger,* therefore, is whether the legislature has shown an overpowering public necessity for this prohibitory provision, and an absence of less onerous alternatives.

The legislature itself has not expressed any perceived public necessity for abolishing a cause of action for injuries occurring more than twelve years after the completion of improvements to real property. Overland suggests that several other states have adopted analogous limitations,[8] principally to counter a trend in the decisional law toward expanded liability for professional engineers, architects and contractors, and that the need for this type of statute is predicated on the difficulty of proof which naturally accompanies the passage of time.

We recognize the problems which inhere in exposing builders and related professionals to potential liability for an

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[6] *Slavin v. Kay,* 108 So.2d 462, 465—67 (Fla.1959). While the common law rule in effect in 1776 had severely limited a contractor's liability, a more expansive view was developed by our courts over the years as exceptions to the general rule. For a discussion of the evolution of contractor liability in Florida, *see Slavin,* and *see generally,* W. Prosser, Torts § 104, at 680—82 (4th ed. 1971).

[7] § 95.11(4), Fla.Stat. (1967).

[8] *See,* for example, *Carter v. Hartenstein,* 248 Ark. 1171, 455 S.W.2d 918 (1970), *appeal dismissed,* 401 U.S. 901. 91 S.Ct. 868. 27 L.Ed.2d 800 (1971); *Joseph v. Burns,* 260 Or. 493, 491 P.2d 203 (1971).

indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action. The legislation impermissibly benefits only one class of defendants, at the expense of an injured party's right to sue, and in violation of our constitutional guarantee of access to courts.

This analysis of section 95.11(3)(c) naturally calls for an explanation of our recent decision in *Bauld v. J. A. Jones Construction Co.,* 357 So.2d 401 (Fla.1978), where we sustained this very provision in the face of a constitutional challenge by one whose cause of action was curtailed, rather than wholly barred, by the effect of section 95..11(3)(c). In *Bauld,* unlike the present case, the injury occurred prior to the enactment of section 95.11(3)(c), at a time when the applicable statute of limitations provided only that suit must be commenced within four years.[9] When section 95.11(3)(c) took effect in 1975, two and one-half years of that period had elapsed, during which time an action could have been filed. Moreover, the savings clause of section 95.022[10] extended the deadline for instituting existing causes of action which would otherwise have been terminated by the new twelve

[9] § 95.11(4), Fla.Stat. (1971).

[10] Under section 95.022, any action barred by the new statute that would not have been barred under prior law could still be commenced at any time before January 1, 1976. Of course, this provision is of no benefit to Sirmons, or others similarly situated, whose right of action had not arisen prior to January 1, 1975.

year limitation for an additional year. Consequently, the absolute twelve year prohibitory provision did not operate to abolish Pearl Bauld's cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years. Although shortened, the time for bringing suit was found to be ample and reasonable; it was not forestalled altogether.

By contrast, Sirmons' cause of action was already barred by the twelve year limitation when it first accrued—that is, when his injuries occurred. No judicial forum would ever have been available to Sirmons if the twelve year prohibitory portion of the statute were given effect. Obviously, our decision as to the validity of the statute vis-a-vis Pearl Bauld would not operate to bar our declaring the same statute invalid vis-a-vis Jerry Sirmons.

Some mention should be made of decisions from other jurisdictions concerning similar statutes. In several cases relied on by Overland the courts reviewed statutory provisions similar to section 95.11(3)(c) under a much less exacting standard than our own constitution and decisional law require. The courts in those states essentially determined that their laws constituted a reasonable exercise of the police power, unrelated to any "access to courts" provision in their organic law or a subservient *Kluger* standard.[11]

A foreign decision which we do find persuasive, however, is *Saylor v. Hall,* 497 S.W.2d 218 (Ky.1973), in which a like statute was tested against a constitutional provision guaranteeing a right of access to courts similar to our own.[12] The Kentucky court recognized that a majority of other jurisdictions considering the issue had upheld the validity of such statutes against due process and equal protection

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[11] Several state statutes are identified in Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action,* 18 Catholic U.L.Rev. 361 (1969).

[12] Section 14 of the Constitution of Kentucky provides:

All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

attacks, but it nonetheless held that

> the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action.[13]

We similarly conclude that in Florida, as in Kentucky, the unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this "statute of repose" may be valid under state or federal due process or equal protection clauses.

We hold that, insofar as section 95.11(3)(c), Florida Statutes (1975), provides an absolute bar to lawsuits brought more than twelve years after events connected with the construction of improvements to real property, it violates article I, section 21 of the Florida Constitution. The order of the trial court is, therefore, affirmed.

It is so ordered.

ADKINS, SUNDBERG and HATCHETT, JJ., concur

ALDERMAN, J., dissents with an opinion, with which BOYD and OVERTON, JJ., concur.

ALDERMAN, J., dissenting.

Section 95.11(3)(c), Florida Statutes (1975), prevents a cause of action founded on the design, planning, or construction of an improvement to real property from arising against professional engineers, registered architects, and licensed contractors after twelve years from the date of actual possession by the owner, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his

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[13] 497 S.W.2d at 225.

employer. The majority, relying on *Kluger v. White,* 281 So.2d 1 (Fla.1973), holds this section to be in violation of article I, section 21, of the Florida Constitution, because the legislature failed to show an overpowering public necessity or that there was no less onerous alternative method.

Although the legislature, in section 95.11(3))c) did not make an express finding that this statute was enacted to meet an overpowering public necessity and that there is no less onerous alternative, it is apparent to me that the limitation on causes of actions imposed by this section was created to meet such a necessity. Some insight into the purpose of section 95.11(3)(c) may be found in *Grissom v. North American Aviation, Inc.,* 326 F.Supp. 465 (M.D.Fla.1971). In that case, the court was considering section 95.11(10), Florida Statutes (1969), the predecessor to section 95.11(3)(c), which provided a time limitation of twelve years within which actions may be brought against professional engineers and registered architects. The widow of astronaut Virgil Grissom sued for the wrongful death of her husband, who had been killed while engaged in a "ground test" of an apollo space capsule. One of the issues before the court was the intent of the legislature in passing the twelve-year limitation. In the absence of any legislative history, the court looked to a somewhat similar statutory proposal that had been before the United States House of Representative—H.R. Bill No. 4181. The court considered House Report No. 91—370, which accompanied H.R. Bill 4181. The report explained the basis for limiting to some definite period the time in which an action could be brought against the engineers, architects, or designers of improvements to realty. The reasons set out in the report are equally applicable to Florida and make clear the overpowering public necessity for section 95.11(3)(c). The report in part said:

> ". . . Architects who design buildings or improvements to real property, engineers who design and install

equipment, or contractors, who build the improvements under rigid inspection and conformity with building codes, may find themselves named as defendants in such damage suits many years after the improvement was completed and occupied.

Comparatively, modern architecture, engineering, and construction, with the new techniques, technology, and methods, may give the appearance of defective or unsafe conditions to older structures which conditions may be used as a basis for such damage suits. In such cases, the architectural plans used may have been discarded, copies of building codes in force at the time of design or construction may no longer be in existence and the persons who were individually involved may have deceased or may not be located. The purpose of the law is to provide a reasonable time and opportunity for a person who has suffered injury or damages to bring an action. To permit the bringing of such actions without any limitation as to time places the defendant in an unreasonable position if not imposing the impossibility of asserting a reasonable defense.

At hearings before your Committee, specific cases were mentioned to illustrate the need for the pending legislation. In one case an architectural firm designed an auditorium which was built in 1928. In 1965, a visitor to the auditorium fell on the stairway and was injured. Her allegation in a suit for damages against the owner was that her injury was due to the improper location of a handrail. The owner of the building, in turn, filed suit against the architect for alleged negligence in designing the stairway and handrail. Thus, 38 years after the completion of the construction the architectural firm is now defending itself against a $50,000 lawsuit.

In another instance an engineering firm designed a grain elevator which was built in 1934. The elevator was destroyed by an explosion in 1957. In 1959, the owner

sued the engineer for $250,000 alleging that the explosion was due to errors in the design of the ventilation system.

In the first case, none of the architects involved in the design of the auditorium is alive today but the architectural firm is being sued. The plans, specifications, and contracts may have been lost or destroyed. Old building codes, essential to the defense cannot be found. In the grain elevator case, the plaintiff in effect alleged that the engineer should have created in 1934 a ventilation system based on 1959 standards and technology.

Architects, engineers, and contractors have no control over an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years. They cannot prevent an owner from using an improvement for purposes for which it was not designed. Nor can they prevent the owner of a building from making alterations or changes which may, years afterward, be determined unsafe or defective and appear to be a part of the original improvement."

326 F.Supp at 467—8. The federal district court determined that this same general intent was a major reason for passage of section 95.11(10) and similar statutes in other jurisdictions.

If the legislature, in enacting section 95.11(3)(c), had made findings similar to those quoted above, there could be little doubt that it would have shown an overpowering public necessity and the absence of a less onerous alternative. Even without such express recital, however, I believe the need for section 95.11(3)(c) is clear. In the present case, the time lapse was sixteen years, but it could just have well been thirty-two or sixty-four years. Without section 95.11(3)(c), there is no limitation on the number of years after which a suit could be brought against an engineer, architect, or contractor.

The legislature has balanced the conflicting interests and determined that twelve years is a reasonable time after which a cause of action may not arise. In doing so, it has not, in my opinion, violated article I, section 21 of the Florida Constitution. I would reverse the trial court's order.

BOYD and OVERTON, JJ., concur.

Dante A. BATTILLA and Gail A. Battilla, his wife, Appellants,

v.

ALLIS CHALMERS MANUFACTURING COMPANY and Travelers Insurance Company, Appellees.

No. 55908.

Supreme Court of Florida.

Dec. 11, 1980.

Rehearing Denied Feb. 12, 1981.

Product liability action was brought against manufacturer. The Circuit Court, Broward County, Lamar Warren J., held action barred by statute of limitations, and plaintiffs appealed. The Supreme Court held that statute as applied unconstitutionally denied plaintiffs access to the courts.

Reversed.

McDonald, J., dissented and filed opinion, in which Overton and Alderman, JJ., concurred.

Constitutional Law ⇐ 328

Limitation of Actions ⇐ 4(2)

Statute barring plaintiff's suit against manufacturer brought more than 12 years after date of sale as applied, unconstitutionally denied plaintiffs access to court under Florida Constitution. West's F.S.A.Const. Art 1, § West's F.S.A. § 95.031.

Walter G. Campbell, Jr. of Krupnick & Campbell, and Nancy Little Hoffmann, Fort Lauderdale, for appellants.

Steven R. Berger of Carey, Dwyer, Cole, Selwood & Bernard, Miami, for appellees.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. The judgment passed upon validity of a state law. The notice of appeal was filed January 12, 1979. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).

The circuit court held that this product liability action was barred by the statute of limitations, section 95.031, Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Sirmons,* 369 So.2d 572 (Fla.1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. *See also Purk v. Federal Press Co.,* 387 So.2d 354 (Fla.1980); *Bauld v. J. A. Jones Construction Co.,* 357 So.2d 401 (Fla.1978).

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD and ENGLAND, JJ., concur.

McDONALD, J., dissents with an opinion, with which OVERTON and ALDERMAN, JJ., concur.

McDONALD, Justice, dissenting.

I disagree that there is anything unconstitutional about section 95.031(2). Although I recognize that the language in *Overland*[1] is such that it could be authority to extend its

[1] *Overland Construction Co., Inc. v. Sirmons,* 369 So.2d 572 (Fla.1979).

application to this section. I would limit that holding to section 95.11(3)(c). I do this not for any reason expressed or exceptions made in *Overland* but because a twelve-year limitation may be reasonable for liability for manufactured products and not for liability for improvements to real property.

Until the decision of *Matthews v. Lawnlite Co.*, 88 So.2d 299 (Fla.1956), Florida recognized the early common law rule which inhibited recover where there was no privity of contract. Since then the law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.[2]

This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufactured products.

The legislature, in enacting section 95.031(2), has determined that perpetual liability places an undue burden on manufacturers. It has determined that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturers of products. I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in *Overland*, and those listed in section 95.031(2).

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[2] *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).

I would sustain the trial judge's actions in upholding section 95.031(2), Florida Statutes, which statute restricts actions against a manufacturer to twelve years from the date of the sale of the product.

OVERTON and ALDERMAN, JJ., concur.

DISTRICT COURT OF APPEAL
FIRST DISTRICT

Tallahassee, Florida 32301
Telephone No. (904) 488-6152

January 13, 1986

Case No. BK-198

EFFIE DELL CASSIDY, et al

Appellant/Petitioner

vs.

THE FIRESTONE TIRE AND RUBBER COMPANY, et al.

Appellee/Respondent

ORDER

Pursuant to Fla.R.App.P. 9.125, this court certifies the following question as one requiring immediate resolution by the Supreme Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state:

WHETHER THE RULE ANNOUNCED IN *PULLUM v. CINCINNATI, INC.*, 476 So.2d 657 (FLA. 1985) IS APPLICABLE TO CASES FILED PRIOR TO PUBLICATION OF THAT OPINION.

Supreme Court of Florida

TUESDAY, JANUARY 21, 1986

EFFIE DELL CASSIDY, et al.,

Petitioners,

v.

FIRESTONE TIRE AND RUBBER COMPANY, et al.,

Respondents.

CASE NO. 68,160

District Court of Appeal,
1st District - BK-198

The District Court of Appeal, First District, pursuant to article V, section 3c(5), Florida Constitution, has certified a final judgment of the circuit court in and for Escambia County, Florida, as one requiring immediate resolution by this Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state.

The district court of appeal's request to invoke our discretionary jurisdiction is denied.

ADKINS, Acting C.J., OVERTON, McDONALD and SHAW, JJ., concur
EHRLICH and BARKETT, JJ., dissent